PUJAAN PERTAMA SDN BHD v. YAP LEE CHUAN & ORS

COURT OF APPEAL, PUTRAJAYA
YAACOB MD SAM JCA
LEE HENG CHEONG JCA
AZIZUL AZMI ADNAN J
[CIVIL APPEAL NO: N-01(NCVC)(W)-408-07-2021]
19 DECEMBER 2022

Abstract – *An appellate court may disturb a lower court's decision only where the lower court judge had come to a conclusion which no reasonable judge could have reached, which is only possible when there is a consistent application of the 'plainly wrong' principle underlying the appellate intervention. When there has been a holistic approach, considerable appellate restraint should be exercised when reviewing a first instance judgment on appeal.*

LAND LAW: *Sale of land – Forgery – Land sold to first purchaser and then, to second purchaser – Whether Form 14A executed by land proprietors – Whether execution of Form 14A validly attested to – Whether signature on Form 14 forged – Whether first purchaser obtained transfer of land by fraud – Whether second purchaser could avail itself of proviso to s. 340(3) of National Land Code – Whether bona fide purchaser for valuable consideration – Whether second purchaser's title indefeasible*

The respondents ('plaintiffs') were the registered proprietors of a piece of land. On or about 2 June 2017, the plaintiffs were informed that the land was no longer registered in their names, despite the fact that they had never sold the land and that the issue document of title for the land remained in their possession. Searches conducted with the land office revealed that the land had first been transferred, by persons purporting to be the plaintiffs, to Fu Zhi Mao Group Sdn Bhd ('Fu Zhi Mao') for the consideration of RM1 million. The Form 14A, by which the land was conveyed to Fu Zhi Mao by the plaintiffs, bore a signature purporting to be that of a solicitor ('Norizah'). Fu Zhi Mao then sold the land for RM400,000 to Pujaan Pertama ('appellant'), as documented in a sale and purchase agreement after which the appellant became the registered proprietor. At the High Court, the plaintiffs sued the appellant, Fu Zhi Mao, the Port Dickson Land Administrator and its District Officer and the Director for Land and Mines and Norizah for, among others, the recovery of the land. The trial judge found that Norizah's testimony, denying that she had attested the signatures of the plaintiffs on the Form 14A that documented the first transfer to Fu Zhi Mao and that the signature in the attestation clause on the Form 14A was not hers, corroborated the plaintiffs' version of events, that they had never executed

the Form 14A. The trial judge also found that the appellant failed to establish that it was a purchaser in good faith and for valuable consideration and therefore could not avail itself of the proviso to s. 340(3) of the National Land Code ('NLC') in order to obtain an indefeasible title. The trial judge therefore, allowed the plaintiff's claim against the appellant, Fu Zhi Mao and the Director for Land and Mines, and directed that the land be re-registered in the name of the plaintiffs. Hence, this appeal by the appellant.

Held (dismissing appeal with costs)
Per Azizul Azmi Adnan J delivering the judgment of the court:

(1) The determination by the trial judge that the Form 14A dated 11 July 2016 ('Form 14A') was a forgery was a finding of fact, which was based primarily on the fact that the solicitor whose name appeared on Form 14A had testified that the signature was not hers, and that the Form 14A bore the stamp of the law firm that she had left some four years prior to the date of the Form 14A. As she had not attested to the signing of the form, it followed that her signature was a forgery, which led the trial judge to conclude that it was probable that the signatures of the plaintiffs were forgeries too. This was not a finding of fact that no reasonable court, similarly circumstanced, could have arrived at based on the evidence on record. The trial judge was not plainly wrong in arriving at this finding of fact. (paras 16 & 20-22)

(2) The handwriting expert made a definitive conclusion that the signature purporting to be that of the second plaintiff was likely not his, thus establishing that at least one of the signatures of the three transferors was, on a balance of probabilities, a forgery. Further, the handwriting expert could not exclude the possibility that the signatures purporting to be those of the first and third plaintiffs, had not been authored by them, as the structures of each disputed signature were so different from those of the undisputed specimen signatures, that no suitable comparison could be made between them. Hence, the only available conclusion must necessarily be that the signatures were forgeries too, like the signature purporting to be that of the second plaintiff. It was also established that the Form 14A did not contain the correct NRIC number of the second plaintiff. For these reasons, the finding by the trial judge that the Form 14A was a forgery ought not be disturbed. (paras 24-28)

(3) A finding of fraud made against the second defendant would operate to bind the rest of the parties in the action. Fraud on the part of Fu Zhi Mao was proven by its failure to defend the action. Since the appellant had dealt directly with the rogue Fu Zhi Mao, the appellant acquired defeasible title pursuant to s. 340(2) of the NLC. The issue of whether the appellant had discharged the burden of proving that it was a *bona fide*

purchaser for valuable consideration did not arise, because it was not a subsequent purchaser for the purposes of the proviso to s. 340(3) of the NLC. Nor would it be necessary for the plaintiffs to establish fraud or conspiracy against the appellant, or that there had otherwise been impropriety in the conveyance of the property Fu Zhi Mao to the appellant. (paras 30, 37 & 38)

Case(s) referred to:

He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal [2020] 7 CLJ 271 FC ***(refd)***
Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(foll)***
MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd [2016] 4 CLJ 665 CA ***(refd)***

Legislation referred to:

National Land Code, s. 340(2), (3)

For the appellant - Ravinder Singh Sodhi & Kai Chi Theng; M/s Sodhi Chambers
For the respondents - Tan Chong Lii, Lee Kai Yet, Lim Hoon Pin & Wong Sze Some; M/s Yee & Lee Partners

[Editor's note: Appeal from High Court, Seremban; Summons No: NA-21NCVC-6-10-2018 (affirmed).]

Reported by S Barathi

JUDGMENT

Azizul Azmi Adnan J:

Introduction

[1] The appellant in this case, Pujaan Pertama Sdn Bhd, was a purchaser of a piece of land previously registered in the name of the respondents, the Yap brothers. The Yap brothers were the plaintiffs in the court below.

[2] The plaintiffs had sued the appellant, another company by the name of Fu Zhi Mao Group Sdn Bhd (which was the second defendant in the original action), the Port Dickson Land Administrator and its district officer and the director for land and mines (the third to fifth defendants respectively) and an advocate and solicitor by the name of Norizah binti Ramli (the sixth defendant). The suit was for (among others) the recovery of the piece of land.

[3] After a trial of the action, the High Court allowed the plaintiff's claim against Pujaan Pertama, Fu Zhi Mao and the director for land and mines, and directed that the land be re-registered in the name of the plaintiffs.

[4] Pujaan Pertama appealed against this decision. We unanimously dismissed its appeal, for the reasons set out here. This is the judgment of the court.

A **Material Background Facts**

[5] The plaintiffs were the registered proprietors of a piece of land measuring some six acres located in the mukim of Jimah, on which land was planted oil palm. On or about 2 June 2017, the plaintiffs were informed that the land was no longer registered in their names, despite the fact that they had never sold the land and that the issue document of title for the land remained in their possession.

B

[6] Subsequent searches conducted with the land office revealed that the land had first been transferred by persons purporting to be the plaintiffs to Fu Zhi Mao, the second defendant in the court below, sometime in August 2016. The consideration for this transfer was recorded in the relevant Form 14A as RM1 million. The Form 14A by which the land was conveyed to Fu Zhi Mao by the plaintiffs bore a signature purporting to be that of a solicitor, Norizah binti Ramli, who was the sixth defendant in the original action.

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[7] Fu Zhi Mao then sold the land for RM400,000 to Pujaan Pertama, the appellant before us. This was documented in a sale and purchase agreement dated 15 November 2016. Pujaan Pertama became the registered proprietor on 23 January 2017.

E **[8]** The transactions affecting the land are depicted in the following diagram:

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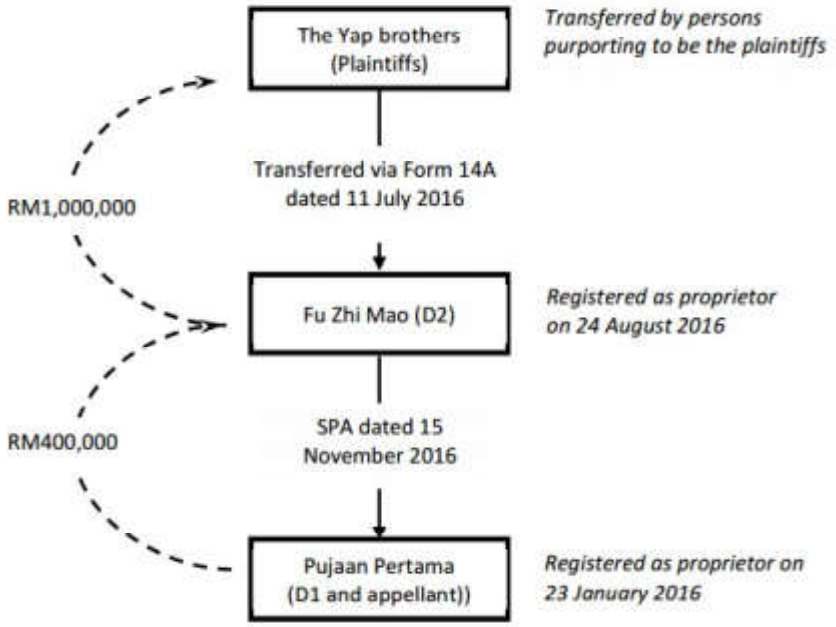
The Yap brothers
(Plaintiffs)
Transferred by persons purporting to be the plaintiffs
Transferred via Form 14A dated 11 July 2016
RM1,000,000
Fu Zhi Mao (D2)
Registered as proprietor on 24 August 2016
SPA dated 15 November 2016
RM400,000
Pujaan Pertama
(D1 and appellant))
Registered as proprietor on 23 January 2016

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H

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At The High Court

[9] At trial, Norizah denied having attested to the signatures of the plaintiffs on the Form 14A that documented the first transfer to Fu Zhi Mao and testified that the signature in the attestation clause on the Form 14A was not hers. Furthermore, the stamp affixed to the Form 14A bore the name of the firm Khairuddin Lina Leong & Co, which she had left some four years prior to the date on which the Form 14A was executed. Forensic examination of the signature also confirmed that it did not belong to Norizah.

[10] The handwriting expert from the department of chemistry who examined the signatures of the plaintiffs was of the view that the signature purporting to be that of the second plaintiff on the Form 14 dated 11 July 2016 was probably not written by the second plaintiff. As regards the signatures purporting to be those of the other plaintiffs, the expert found that "it was not possible to carry out a suitable comparison of the handwriting characteristics to ascertain the authorship" of the questioned signatures. The reason was that the signatures (which were in Chinese characters) were different in structure from the signatures that were provided by the first and second plaintiffs[1].

[11] The trial court found that Norizah's testimony corroborated the plaintiffs' version of events, which was that they had never executed the Form 14A. The material portion of the grounds of judgment of the High Court stated as follows:

> [9] Mahkamah membuat dapatan fakta atas keterangan ini bahawa Plaintif-Plaintif adalah mangsa penipuan mereka yang terlibat dengan jual beli dan pindah milik dan pihak Defendan-Defendan Pertama hingga ke Lima adalah gagal untuk menjawab di dalam pembelaan mereka akan beban di atas kebarangkalian bahawa mereka secara suci hati melaksanakan pindahmilik. Oleh itu keterangan saksi-saksi Defendan masing-masing dan hujahan-hujahan mereka mesti berpaksi kepada keterangan Defendan Keenam yang mana beliau bukannya pihak yang menyaksikan tandatangan Plaintif-Plaintif dan tanpa dapat disangkal Plaintif-Plaintif tidak mungkin menandatanganinya di hadapan Defendan Keenam.

[12] The trial judge also found that the appellant had failed to establish that it was a purchaser in good faith and for valuable consideration and therefore could not avail itself of the proviso to s. 340(3) of the National Land Code in order to obtain an indefeasible title.

The Grounds Of Appeal

[13] The grounds of appeal in this case may usefully be summarised into the following:

(i) the appellant sought to assail the finding of fact by the trial judge that the initial transfer from the plaintiffs (or more accurately, the persons purporting to the plaintiffs) had been effected by a forgery;

(ii) it was advanced for the appellant that the High Court had erred in law and in fact when coming to the conclusion that it was not a purchaser in good faith and for valuable consideration;

(iii) it was also advanced for the appellant that the High Court had erred in law and in fact in finding that the plaintiffs have discharged the burden of proving impropriety in the conveyance of the land from Fu Zhi Mao to the appellant;

(iv) the appellant argued that the High Court erred in law and in fact in finding that the appellant had conspired with Fu Zhi Mao in perpetrating a fraud on the plaintiffs;

(v) the appellant advanced the argument that the plaintiffs had failed to sufficiently plead fraud against the appellant as the first defendant in the original action; and

(vi) finally, it was argued that the plaintiffs ought to have lodged a police report against the directors of Fu Zhi Mao and ought also have made them defendants to the action.

Analysis And Decision

[14] The following paragraphs summarises our findings in this appeal:

(i) it was, in our view, open to the trial judge to make the finding that the Form 14A was a forgery based entirely on the testimony of the sixth defendant, Norizah, and the supporting evidence that she had not been practising with the firm of Khairuddin Lina Leong & Co at the material time. The trial judge was not plainly wrong in arriving at this finding of fact;

(ii) even if this court were to re-evaluate the evidence that was before the trial court, we would have come to precisely the same conclusion as the trial judge because:

(a) the handwriting expert testified that the signature on the relevant Form 14A purporting to be that of the second plaintiff was likely not his;

(b) even though the handwriting expert could not exclude the possibility that the signatures purporting to be those of the first and third plaintiffs had not been authored by them, he was of the view that the signatures on the Form 14A were significantly different from their undisputed specimen signatures – so different, in fact, that suitable comparisons could not be made between them; and

(c) the Form 14A did not contain the correct NRIC number of the second plaintiff;

(iii) the failure by Fu Zhi Mao, the second defendant in the present case, to defend the plaintiffs' contention of fraud against it meant that the allegation of fraud against Fu Zhi Mao was taken to have been proven, on the authority of *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987. Because Pujaan Pertama, the appellant, had dealt directly with the Fu Zhi Mao, it was an immediate purchaser and could not avail itself of the proviso to s. 340(3) of the National Land Code to show that it was a *bona fide* purchaser who had provided valuable consideration. Its title was accordingly defeasible;

(iv) as a consequence of these findings:

(a) the issue of whether the appellant has discharged the burden of proving that it was a *bona fide* purchaser for valuable consideration did not arise, because it was not a subsequent purchaser for the purposes of the proviso to s. 340(3) of the National Land Code;

(b) it was not necessary for the plaintiffs to establish fraud or conspiracy against the appellant; and

(c) it was also not necessary for the plaintiff to establish that there had otherwise been impropriety in the conveyance of the property Fu Zhi Mao to the appellant;

(v) we saw no reason why the plaintiffs ought to have joined the directors of Fu Zhi Mao as parties to the action in order to succeed in their action; and

(vi) similarly, the failure of the plaintiffs to lodge a police report against the directors of Fu Zhi Mao would not have any particular legal consequence in the circumstances of the present case.

[15] The analyses underlying these findings are explained in the following paragraphs.

Forgery

[16] The determination by the trial judge that the Form 14A dated 11 July 2016 was a forgery was a finding of fact. The legal position in respect of appeals against findings of fact is well settled. The applicable principles have been explained by this court in the following passage from the case of *MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd* [2016] 4 CLJ 665; [2016] 2 MLJ 428:

> [14] The requirement for the trial judge to have come to a finding which was 'plainly wrong' before an appellate court may intervene is therefore well entrenched in our appellate philosophy and practice. In *Henderson v. Foxworth Investments Ltd and another*, Lord Reed considered the meaning to be accorded to the phrase 'plainly wrong':

> ... there may be some value in considering the meaning of that phrase. There is a risk that it may be misunderstood. The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

[15] This is a point of some importance because it underscores the rationale that the appellate court is not at liberty to reverse or interfere in the finding of a trial judge even if the appellate court is clearly of the view that it would not have reached the conclusion the trial judge did on the evidence on record before it. It requires something more. The requisite or correct standard to be applied is that no reasonable judge, on the evidence on record, could have reached the conclusion of the trial judge. In other words, so long as the findings of the trial judge are plausible on the evidence on record, there is no room for interference merely on the grounds that the appellate court forms a different opinion on the same evidence.

[16] There is, however, little room for variation in the application of the principle of intervention when the trial judge is 'plainly wrong'. Appellant courts ought to be consistent in ensuring that appellate intervention only comes about when a trial judge reaches a conclusion which no reasonable judge could have reached. A lack of such consistency in approach would give rise to considerable uncertainty in the practice and progress of litigation. Litigants through their counsel should be able to assess with some degree of certainty, on clear and distinctly applied principles of law, whether a judgment obtained at first instance is likely to be overturned or not. This is only possible if there is a consistent application of the 'plainly wrong' principle underlying appellate intervention.

[17] The obverse or counterpart to the requirement for appellate restraint in dealing with findings of fact by the trial judge is the fundamental requirement that the judgment of first instance does in fact amount to a comprehensive and cohesive determination of the material matters comprising the subject matter of dispute before the trial judge. This requires the trial judge to undertake a full evaluation of the evidence and issues placed before the court. A first instance judgment is open to challenge when it fails to address or wholly ignores material evidence or issues placed before it, or when bald findings of fact are made with no reasoning or evidence to substantiate such findings. Equally errors of law, a clear misunderstanding of relevant evidence and such clearly identifiable errors will all contribute towards a decision that would be considered to be 'plainly wrong'.

[18] Judicial decisions are required to be handed down expeditiously and with minimum delay. However this ought not to compromise the fundamental requirement that trial judges undertake a comprehensive and holistic approach to the evaluation of evidence in reaching their findings

at first instance. A failure to consider the entirety of the evidence and material issues, a failure to make findings of fact or the making of bare findings of fact, all allow for appellate intervention. Apart from the real possibility of a miscarriage of justice, such omissions by a trial judge require the appellate courts to take on the role of first instance judges and review the evidence in its entirety afresh. This in turn amounts to a strain on judicial resources. The importance of a comprehensive consideration of the matter at first instance cannot be sufficiently emphasised. Equally when there has been just such a holistic approach adopted, there should be considerable appellate restraint exercised when reviewing a first instance judgment on appeal.

[17] Is the finding of the trial judge plausible? If so, the fact that we would have come to a different opinion based on the evidence on record does not, of itself, justify appellate intervention.

[18] It was advanced for the appellant that the respondents had failed to discharge the burden of proving that the initial transfer of the subject property from the plaintiffs to the second defendant was effected through a forged instrument of transfer.

[19] According to the appellant, this was because Mr Teo Chee Hau (SP1), who was the handwriting expert called by the plaintiffs, could not conclusively state that the plaintiffs' signatures on the Form 14A dated 11 July 2016 had not been signed by them.

[20] It will be recalled that the trial judged based his findings of fact based primarily on the fact that the solicitor whose name appeared on the Form 14A dated 11 July 2016 had testified that the signature was not hers, and that the Form 14A bore the stamp of the law firm that she had left some four years prior to the date of the Form 14A. The trial judge stated as follows in his grounds of judgment:

[7] Defendan Keenam mengesahkan bahawa tandatangan peguam yang menyaksikan tandatangan Plaintif-Plaintif pada Borang 14A adalah bukan tandatangan beliau (Defendan Keenam). Malah yang paling penting menurut keterangan Defendan Keenam ialah pada tarikh yang tertera pada Borang Pindahmilik iaitu 11.07.2016 Defendan Keenam tidak lagi bekerja di Tetuan Khairuddin Lina Leong & Co. Defendan Keenam turut membuat Laporan Polis dan membuat pengesahan melalui Laporan Pemeriksaan Tandatangan di Jabatan Kimia Malaysia mengesahkan bahawa tandatangan Defendan Keenam adalah berlainan pada Borang 14A (Lihat D11 laporan polis dan D12 laporan Jabatan Kimia Malaysia). Defendan Keenam turut mendapatkan pengesahan dari Majlis Peguam Malaysia [D13] beliau bekerja di Tetuan Khairuddin Lina Leong & Co bermula pada 08.03.2011 sehingga 31.08.2012 dan telah berhenti pada 01.09.2012 lagi. Dengan kata lain tarikh 11.07.2016 adalah 4 tahun setelah Defendan Keenam meninggalkan firma tersebut.

A [8] Dengan kata lain ianya menyokong kes tuntutan pihak-pihak Plaintif-Plaintif bahawa tidak mungkin mereka menandatanganinya di hadapan peguam Defendan Keenam akan Borang 14A tersebut apabila Defendan Keenam sendiri mengesahkan tandatangan Defendan Keenam adalah palsu dan Defendan Keenam telah lama meninggalkan firma tersebut.

B **[21]** In our considered opinion, it was entirely open to the trial judge to make the finding that the Form 14A was a forgery based on the testimony of Norizah and the supporting evidence that she had not been practising with the firm of Khairuddin Lina Leong & Co at the material time. If she had not attested the signing of the form, then it follows that her signature was a C forgery, which led the trial judge to conclude that it was probable that the signatures of the plaintiffs were forgeries too.

[22] This was not a finding of fact that no reasonable court, similarly circumstanced, could have arrived at based on the evidence on record. The trial judge was not plainly wrong in arriving at this finding of fact.

D **[23]** Now, even if this court were to re-evaluate the evidence that was before the trial court, we would have come to precisely the same conclusion. The reason are as follows.

[24] Firstly, contrary to the submissions of counsel, the handwriting expert E had in fact come to a definitive conclusion that the signature purporting to be that of the second plaintiff was likely not his. Thus, it was established that at least one of the signatures of the three transferors was, on a balance of probabilities, a forgery.

[25] Secondly – and this was an important point missed by learned counsel F – even though the handwriting expert could not exclude the possibility that the signatures purporting to be those of the first and third plaintiffs had not been authored by them, the reason that he had come to this conclusion was that the structures of each disputed signature were so different from those of the undisputed specimen signatures, that no suitable comparison could be G made between them. This was the reason why Mr Teo could not give a conclusive opinion to exclude the possibility that the signatures had been authored by the first and third plaintiffs.

[26] But the fact remains that the signatures were different. Why would the first and third plaintiffs sign their names differently on the Form 14A from H their usual signatures? There would be, in our considered opinion, no reason to do so. The only available conclusion must necessarily be that the signatures were forgeries too, like the signature purporting to be that of the second plaintiff.

[27] Finally, it was established at trial that the Form 14A dated 11 July I 2016 did not contain the correct NRIC number of the second plaintiff.

[28] For these reasons, we were of the view that the finding by the trial judge that the Form 14A dated 11 July 2016 was a forgery ought not be disturbed.

Fraud By D2

[29] It is important to appreciate that the plaintiffs had pleaded not just that the transfer to the Fu Zhi Mao was effected by a forged document, but also that Fu Zhi Mao had acted fraudulently in acquiring the subject land. Because Fu Zhi Mao did not defend the action, the plaintiffs' claims against it will be taken as having been proven in their entirety.

[30] Once a finding of fraud is made against the second defendant, this finding will operate to bind the rest of the parties in the action: see the Federal Court case of *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987.

[31] The appellants in that case alleged that an order under the Small Estates Distribution Ordinance 1955 had been obtained by fraudulent means by the first to fourth respondents, who subsequently transferred undivided shares in the lands in dispute to the fifth and sixth respondents. The Federal Court held that, due to their failure to defend the claim, fraud was taken to have been proven against the first to the fourth respondents. Jeffrey Tan FCJ stated:

> The cause of action of the appellants against the first to fourth respondents was fraud in the distribution of the estate of the deceased. When judgment was entered against the first to fourth respondents, all allegations of fraud which gave rise to the cause of action merged in the judgment (see *Distillers Co Bio-Chemicals (Australia) Pty Lyd v. Ajax Insurance Co Ltd* (1974) 2 ALR 321, where the High Court of Australia per Menzies J said "... the plaintiff's cause of action against the insured would merge in the judgment once it was obtained ...") and the rights of the appellants to relief became rights to enforce the judgment (see *Liaw Watt Lee & Ors v. Baiduri Bank Bhd* [2010] 5 MLJ 551, where the Brunei Court of Appeal per Power PCA expressed "that generally when judgment is given in an action, the original causes of action merge in the judgment; the plaintiff's rights to relief as expressed in the statement of claim are extinguished and become rights to enforce the judgment instead"). Until set aside, the default judgment was the incontestable proof of fraud by the first to fourth respondents.

[32] The Federal Court went on to hold that the title of the fifth and sixth defendants was defeasible, as they were immediate purchasers who had acquired title from persons tainted with fraud. In other words, the default judgment against the first to fourth respondents established fraud against them, and this finding of fraud operated to defeat the title of the fifth and sixth defendants.

[33] By the same token, the failure by Fu Zhi Mao, the second defendant in the present case, to defend the plaintiffs' contention of fraud against it meant that the allegation of fraud against Fu Zhi Mao was taken to have been proven.

The Transfer From D2 To D1

[34] The next question for determination was whether Pujaan Pertama was an immediate purchaser or subsequent purchaser, for it was only if it was a subsequent purchaser that it could acquire an indefeasible title. In *Kamarulzaman Omar & Ors v. Yakub Husin & Ors*, the Federal Court provided the following guidance to trial courts when dealing with the issue of indefeasibility of title:

> Whenever a registered title or interest is sought to be set aside under s. 340, first ascertain whether the title or interest under challenge is registered in the name of an immediate purchaser or a subsequent purchaser. If the title or interest is registered in the name of an immediate purchaser, the *bona fides* of the immediate purchaser will not offer a shield of indefeasibility. The title or interest of an immediate purchaser is still liable to be set aside if any of the vitiating elements as set out in s. 340(2) has been made out. If the title or interest is registered in the name of a subsequent purchaser, then the vitiating elements in s. 340(2) would not affect the title or interest of a *bona fide* subsequent purchaser. The title or interest of a subsequent purchaser is only liable to be set aside if the subsequent purchaser is not a *bona fide* subsequent purchaser. The title or interest acquired by a subsequent purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a subsequent purchaser, is indefeasible.

[35] The question to be considered was whether Pujaan Pertama, which had acquired the subject land from Fu Zhi Mao, was an immediate purchaser or subsequent purchaser. If it was an immediate purchaser, then its title would be defeasible even if it had acted *bona fide*, paid full value for the land and possessed no notice of the prior fraud.

[36] The Federal Court in *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal* [2020] 7 CLJ 271 explained how this question was to be answered. In this case, the issue arose whether AmBank (M) Bhd, which held a charge over a property that was registered in the first defendant's name but had earlier been sold to the plaintiff, was an immediate or subsequent purchaser. The Federal Court ruled that AmBank as chargee was immediate purchaser, stating:

> [102] The immediacy of the purchase relates to the vitiating vendor, not how far removed it is in the tally among the purchasers. To be a subsequent purchaser, it must have purchased the interest in the property that is being used as a security from a purchaser who is one that is *bona fide* for value. **Any direct dealing with a rogue will necessarily vitiate the transaction rendering it defeasible**, although it is duly registered.
>
> (emphasis added)

[37] Thus the short-but-complete-answer was that, because Pujaan Pertama had dealt directly with the rogue Fu Zhi Mao, the title that Pujaan Pertama acquired was defeasible pursuant to s. 340(2) of the National Land Code. Pujaan Pertama was an immediate purchaser and could not avail itself of the proviso to s. 340(3) of the National Land Code to show that it was a *bona fide* purchaser who had provided valuable consideration and accordingly that its title was indefeasible.

[38] The reasoning explained above would, in our considered opinion, be sufficient to dispose of the entirety of the appeal. In our view, the issue of whether appellant has discharged the burden of proving that it was a *bona fide* purchaser for valuable consideration did not arise, because it was not a subsequent purchaser for the purposes of the proviso to s. 340(3) of the National Land Code. Nor would it be necessary for the plaintiffs to establish fraud or conspiracy against the appellant, or that there had otherwise been impropriety in the conveyance of the property Fu Zhi Mao to the appellant. Fraud on the part of Fu Zhi Mao was proven by its failure to defend the action. The appellant had dealt directly with Fu Zhi Mao, and thus the appellant was an immediate purchaser, and did not obtain an indefeasible title.

[39] For completeness, we would add that we saw no reason why the plaintiffs ought to have joined the directors of Fu Zhi Mao as parties to the action. It was entirely the plaintiffs' prerogative as to who they wished to sue. Indeed, the same observation may be made of the defendant: why have they not made Fu Zhi Mao a third party to the action? It would appear to us that, if the appellant had been an innocent victim in the transaction, it would have had an actionable claim against Fu Zhi Mao for the return of the purchase price paid.

[40] Nor would the failure of the plaintiffs to lodge a police report against the directors of Fu Zhi Mao have any particular legal consequence in the circumstances of the present case. Fu Zhi Mao's failure to defend the action was sufficient to establish the plaintiffs' case against it, following *Kamarulzaman Omar & Ors v. Yakub Husin & Ors.*

[41] For the reasons explained in this judgment, we dismissed the appeal with costs of RM10,000, such costs to be subject to an allocator.

Endnote:

1. See p. 572 of encl. 6 in the record of appeal.